Supreme Court of the United States

OCTOBER TERM 1947

No. 83

UNITED ARTISTS CORPORATION,

Appellant;

against

UNITED STATES OF AMERICA,

Respondent,

and

PARAMOUNT PICTURES, INC., PARAMOUNT FILM DISTRIBUTING CORPORATION, LOEW'S INCORPORATED, RADIO-KEITH-ORPHEUM CORPORATION, RKO RADIO PICTURES, INC., KEITH-ALBEE-ORPHEUM CORPORATION, RKO PROCTOR CORPORATION, RKO MIDWEST CORPORATION, WARNER BROS. PICTURES, INC., VITAGRAPH, INC., WARNER BROS. CIRCUIT MANAGEMENT CORPORATION, TWENTIETH CENTURY-FOX FILM CORPORATION, NATIONAL THEATRES CORPORATION, SCREEN GEMS, INC., UNIVERSAL CORPORATION, UNIVERSAL PICTURES COMPANY, INC., UNIVERSAL FILM EXCHANGES, INC., BIG U FILM EXCHANGE, INC., and UNITED ARTISTS CORPORATION,

Defendants-Appellants.

ON DIRECT APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF ON APPEAL OF APPELLANT UNITED ARTISTS CORPORATION

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BRIEF ON BEHALF OF UNITED ARTISTS CORPORATION, APPELLANT

Opinions Below

The opinion of the District Court (R. 3504) is reported in 66 F. Supp. 323 and the Findings of Fact, Conclusions of Law and Decree and a supplemental opinion (R. 3659) are reported in 70 F. Supp. 53.

Jurisdiction

The jurisdiction of this Court to review by direct appeal the judgment and decree entered in this case is conferred by Section 2 of the Expediting Act of February 11, 1903, as amended (32 Stat. 823; 36 Stat. 1167; 58 Stat. 572; 15 U. S. C., Sec. 29), and Section 238 of the Judicial Code, as amended (36 Stat. 1157; 38 Stat. 804; 43 Stat. 938; 28 U. S. C., Sec. 345).

Probable jurisdiction was noted by this Court on June 23, 1947.

Specification of Assigned Errors To Be Urged

The appellant United Artists Corporation has specified in detail in its assignment of errors in what respect it contends that the Court below erred in making its findings of fact (Assignment of Errors 39-56; R. 3775-3779); in making the conclusions of law (Assignment of Errors 57-60; R. 3779-3781); in framing its decree (Assignment of Errors 61; 62, 63 and 64; R. 3781-3785); in not including in its findings, proposed findings by the appellant United Artists Corporation, which should have been made in order to arrive at proper conclusions of law (Assignment of Errors 1-36; R. 3768-3775); in not concluding that the appellant United Artists Corporation did not at any time, during the period involved, combine with the defendant exhibitors or any of their affiliates unreasonably to restrain interstate trade or commerce in motion picture films, to monopolize or attempt to monopolize the distribution or exhibition of motion picture films in the United States of America, and that a decree of dismissal should be entered as to the appellant United Artists Corporation (Assignment of Errors 37, 38; R. 3775).

The appellant United Artists Corporation regards the above assignment of errors as material to the issues presented in this brief.

Statement

This is an appeal (R. 3766) from a decree (R. 3694) of a statutory court in and for the Southern District of New York in a proceeding in equity (R. 3137) brought by the United States of America under Sections 1, 2 and 4 of the Sherman Anti-Trust Act to enjoin the eight appellant corporations.

Five of the appellants, Paramount Pictures, Inc., RKO Radio Pictures, Inc., Warner Bros. Pictures, Inc., Twentieth Century-Fox Film Corporation, and Loew's, Incorporated, are engaged in the production, distribution and exhibition of motion pictures. Two of the appellants, Columbia Pictures Corporation and Universal Pictures Company, Inc., are engaged in the production and distribution of motion pictures. The appellant, United Artists Corporation, is engaged solely in the distribution of motion pictures. All through the litigation the Government referred to the first five defendants (those engaged in production, distribution and exhibition) as the "Big Five", or the major defendants. Columbia, Universal and United Artists were characterized by the Government as the "Little Three", or the minor defendants.

The Government in its petition (R. 3200, subds. 5, 6 and 7 of Prayer for Relief) asked the Court to declare the integration of production and exhibition unlawful as an instrumentality of monopoly and restraint, and that the "Big Five" be directed to divest themselves of all interest and ownership in theatres. On page 3199 of the record, in three catch-all provisions of prayer, the Government asked for general relief against all the defendants. On page 3198 the Government refers to the alleged illegal contracts made by each defendant exhibitor with distributors generally.

These paragraphs of the petition, and the proof offered by the Government, clearly show that this charge of illegal practices is subordinate to the main relief the Government sought in the petition. These governmental afterthoughts are that illegal restraints were brought about by reason of (1) franchise agreements, under which the defendants granted exhibitors the right to exhibit pictures of more than one season's product; (2) pooling arrangements, under which the major defendants pooled their theatres with each other or with third parties; (3) block booking, under which defendants sold a season's product in advance of production; (4) preferential runs, by which defendants' theatres were favored with respect to first run exhibitions and obtained a monopoly of the playing time in the better theatres; (5) unreasonable clearance, by means of which defendants' theatres obtained more protection than was necessary in the exhibition of their pictures as a consequence of which independent theatres were relegated to an inferior and unprofitable run; (6) minimum admission prices, under which the defendants compelled independent exhibitors to keep up admission prices, thereby resulting in a favored position to the affiliated theatres.

The statutory court did not order divestiture or divorcement as requested by the Government, but in effect stated that if the practices referred to in the preceding paragraph were enjoined, and the statutory court's auction block method of selling substituted, that in its opinion the abuses complained of would be eliminated.

The Government has appealed from the Decree of the statutory court and has assigned as error (pp. 3721 to 3723 inclusive) the statutory court's failure to order divorcement and divestiture; and has assigned as further error, the conclusion that competitive bidding would afford appropriate relief from the abuses complained of; in fact, has assigned as error practically every provision of the decree.

The record herein shows that there are over 18,000 motion picture theatres in the United States (R. 3684), and

that motion pictures are played in these theatres on runs. Theatres which generally exhibit motion pictures first, in a competitive area, are referred to as "first-run" theatres. Generally, these are the best theatres in the localities, either by appointments or seating capacity or location (R. 419-420, 702-703, 1510-1511, 1697-1700, 1901-1902, 2043-2044).

Theatres which follow first-run theatres in exhibition in point of time, are referred to as "subsequent run" theatres.

United Artists Corporation was formed in 1919 (R. 1406, 1407) by Mary Pickford, Charles Chaplin, Douglas Fairbanks, and D. W. Griffith, as an outlet for the distribution of feature motion pictures made by independent producers (R. 1409). It generally distributes—when it has a good year—twenty to twenty-six feature pictures, and has handled as low as four in a season (R. 1409), and at no time has it ever distributed as much as five percent of the feature pictures distributed in the United States of America by the eight different distributors (See Findings of Fact 108; R. 3679).

The Government in this case called no witnesses. Its evidence consisted exclusively of documents and data obtained from the defendants through interrogatories and demands for admission. No exhibitor testified that he had been in any way injured by any of the activities of any of the defendants.

United Artists Corporation's position in this lawsuit is unique. It produces no pictures; neither owns nor operates any theatres; has licensed its pictures from the inception of the company, individually and separately, and, generally on separate contracts for each picture for each theatre. The Court's findings of fact as to United Artists (R. 3676; Findings of Fact 95, 96) read as follows:

> "95. United Artists did not at any time license the exhibition of its pictures in blocks but on the contrary licensed the exhibition of its pictures separately and individually.

"96. During the period in question United Artists did not condition the licensing of any photoplay in any exhibitor's theatre upon that exhibitor's agreement to license other United photoplays for exhibition in said theatre."

In addition, the defendant United Artists Corporation used an entirely different provision in its license agreements in connection with minimum admission prices (Gov. Ex. 288, R. 274), that is, a mere warranty that on the day the license agreement was signed the exhibitor was charging a certain admission price—with no agreement that he maintain that admission price for the run of the picture. Notwithstanding this varied evidence, the Court in its decree made no exception as to United Artists Corporation, but included it in all the regulatory provisions relating to distribution.

The Statutes Involved

The United States Statutes under which the case was prosecuted were the Sherman Anti-Trust Act (Sections 1, 2 and 4, Act of July 2, 1890, 26 Stat. 209, as amended; 15 U. S. C. A., Sections 1, 2 and 4; 4 F. C. A., Title 15, Sections 1, 2 and 4), the pertinent provisions of which are as follows:

> "Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce, among the several States, or with foreign nations, is hereby declared to be illegal; * * *"
>
> "Sec. 2. Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce, among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, * * *"
>
> "Sec. 4. The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1 to 7, inclusive, or section 15 of this chapter; and it shall be the duty of the

several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. * * *"

Also directly involved is the Fifth Amendment to the Constitution of the United States:

"No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

Also directly involved is the Copyright Act of March 4, 1909 (35 Stat. Part 1, pp. 1075-1088), as amended August 24, 1912 (37 Stat. Part 1, pp. 488-490), U. S. C. A. Title 17, and particularly that portion thereof which reads as follows:

"That any person entitled thereto, upon complying with the provisions of this Act, shall have the exclusive right:

(a) To print, reprint, publish, copy and vend the copyrighted work;

(b) To translate the copyrighted work into other languages or dialects, or make any other version thereof, if it be a literary work; to dramatize it if it be a non-dramatic work; * * *

(d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or repro-

duced; and to exhibit, perform, represent, produce or reproduce it in any manner or by any method whatsoever.

* * * * *

Sec. 5. That the application for registration shall specify to which of the following classes the work in which copyright is claimed belongs: * * *

(l) Motion-picture photoplays;
(m) Motion pictures other than photoplays; * * *"

Summary of Argument

1. The Government did not prove a prima facie case against United Artists Corporation, and its petition should have been dismissed, either at the close of the Government's case or at the close of the whole case.

2. The uniformities from which the Statutory Court inferred conspiracy and combination, completely negate any idea of conspiracy and combination and are affirmative proof of competition.

3. The Statutory Court had no power by statute or otherwise to legislate the future manner and method of marketing motion pictures in the United States of America. II, Sections 1 to 9 inclusive, Final Decree, R. 3695 to 3698.

4. The Statutory Court erred in finding illegal the following trade practices whether indulged in or not by the defendant United Artists Corporation:

a. franchises;
b. formula deals;
c. licensing of runs including clearances;
d. clearances;
e. availabilities;
f. insertion of admission prices in license agreements.

ARGUMENT

The Statutory Court wrongly inferred combination and conspiracy from certain uniformities found in the evidence.

It is appellant's contention that the uniformities found are inevitable because of the keenness of the competition in the motion picture business. Being inevitable because of that competition, they cannot furnish the basis on which to conclude that there had been combination and conspiracy.

Further, if either an innocent or guilty inference may be drawn from the facts proven, the statutory court is legally bound to accept the innocent inference.

The Government offered no direct evidence of combination or conspiracy as to any of the distributors, and particularly as to the United Artists Corporation.

The principal uniformities relied upon were, first, that wherever *minimum admission prices* were found in any contracts, these minimum admission prices were generally the same; second, that a specific theatre would generally license the same run of exhibition from each distributor, and, third, if *clearances* were specified, the clearance with each distributor would be the same.

From these uniformities the Court inferred combination and conspiracy.

The only direct evidence offered on these matters was offered by the defendants and this evidence abundantly shows that like other businesses there are certain uniformities that will of necessity result from competition rather than from combination and conspiracy.

The fact that United Artists solely through competition accepts the standard practices of the business in order to license its pictures to exhibitors, does not prove that United Artists was in combination and conspiracy to stifle competition.

Every distributor testified that the admission prices inserted in license agreements, were the admission prices charged by the exhibitor at the time of the making of the license.

The Court so found, R. 3670, Finding 63: "The minimum admission prices included in license of each of the eight distributor defendants for any given theatre are in general uniform, being the usual admission prices currently charged by the exhibitor."

As to runs being uniform, any theatre operating in any competitive neighborhood or non-competitive neighborhood would of necessity seek the same run from each distributor. It is important to the exhibitor that a patron attending that theatre shall know that that theatre operates on the same run week after week and season after season. Uniformity proves nothing.

As to uniformity of intervals of time between runs, or clearance, a distributor is required by the exhibitor to allow the same clearance as that which exhibitor receives from the distributor's competitors; in other words, the distributor must meet competition.

If competition is met uniformity follows. The same uniformities may be found in department stores. It is a well known fact that every department store employs professional shoppers to visit competing stores so as to make sure that they are not over-selling any particular piece of merchandise.

There is nothing new or novel in uniformity resulting from competition. Examples ad infinitum of uniformities in commercial business are known to this Court. The record discloses the keenest competition between the eight distributors to license as many runs as possible in as many theatres as possible on the best terms available.

A distributor like United Artists which has no theatre outlets of its own must sell the market as it finds it.

It did not create the market. It could not create a market because as the undisputed evidence shows, during the twenty-six years of its existence the minimum number of pictures it released in one year was as small as four and the maximum approximately only twenty-five. See R. 1409; see also R. 154.

It could not with the exception of possibly two cities (New York and Los Angeles) in any year of its existence, keep one first run theatre supplied with a sufficient number of pictures to operate fifty-two weeks in any year.

It had no steady supply of motion pictures at any time. In fact, the evidence shows that one year, to-wit: 43-44, it had a first class feature for release on Labor Day and not another first class feature until January of 1944 (R. 1409).

It maintained its individual selling policy at all times, and because of its peculiar set-up, nothing could have been offered by the Government to indicate directly or indirectly that it combined or conspired with another distributor or exhibitor to violate any provision of either the Sherman or Clayton Acts (R. 1411-1414).

If uniformities resulted from licensing any United Artists picture to any exhibitor, whether run, clearance, availability, or admission price, these uniformities were the direct result of the competition that the United Artists must meet if it wishes to sell any part of the market it found for its product.

The exhibitor says, if you want to sell me you must sell me this run, this availability, this is my admission price, this is the clearance that I insist upon, this is the clearance I am able to obtain on my other licenses. You either sell me on this basis or I am not interested in your product. And a product so unimportant as United Artists Corporation (numerically) either will be shown or not shown in a particular theatre or theatres depending upon the will of the exhibitor.

If United Artists Corporation is compelled to adopt the regulations set up by the Statutory Court for the licensing of motion pictures, it cannot license its product in any theatre

1. for the same run other distributors license product, ~~because the~~ inevitable result would be uniformity;
2. on the same availability, result uniformity;
3. with the same clearance, result uniformity;
4. with the same provisions as to admission prices, result uniformity.

United Artists Corporation, which owns no theatres and is engaged solely in the distribution of motion pictures produced by independent producers, would be in the unfortunate position of being unable to license any of the fine pictures referred to in Mr. Lazarus' testimony (R. 1409), for exhibition in any theatres.

POINT I

A. The inclusion of a minimum admission price in exhibition license agreements does not constitute a violation of either the Sherman or Clayton Acts and is not price fixing. On the other hand it is essential in determining a fair license fee.

The licensing or distribution of motion pictures is in effect the licensing of "make-believe". No tangible, personal property is sold. In the positive print which is delivered to the exhibitor as an incident to the license there is found a successive series of photographic images that come to life on the screen. Along the edge of the positive print is a sound track. This sound track is synchronized with the photographic images. Reels of this positive print are placed in a projection booth, generally found in the rear of the theatre, and by some magic or wizardry which we cannot explain the photographic part is projected on the screen at the front of the theatre and the sound from the sound track, in synchronization with the photographic images, is broadcast from horns in back of the screen. The result is a dramatic performance, more or less entertaining, depending upon the quality of the picture. This, even in the days of silent pictures, was held to be a dramatic performance. See *Kalem* v. *Harper*, 222 U. S. 55.

The distributor of a picture is interested not only for its reward as stipulated in the license agreement, but for future business dealings with the licensee, upon the admission fees paid by the public for admission to each public performance. At page 1460 of the printed record, as well as at many other points therein, it was incontrovertibly shown that there is no sale of tangible property involved in an exhibition license agreement.

Each exhibition license agreement is in reality the right publicly to perform a dramatic composition on the screen before an audience who paid an admission to get into the

theatre to see the public performance. The print of the picture is not sold, but licensed. It is a non-assignable license, and upon completion of the limited engagement of the particular photoplay in the particular theatre, the print must be returned to the licensor.

In the price-fixing cases in which the Courts have condemned price fixing we find an entirely different set of facts.

In *Bobbs-Merrill Co.* v. *Straus,* 210 U. S. 339, this Court laid down the rule on price fixing which has been followed right down to the present time.

At page 349 Justice Day, who delivered the unanimous opinion of the Court, in referring to the copyright statute, writes as follows:

> "What does the statute mean in granting 'the sole right of vending the same'? Was it intended to create a right which would permit the holder of the copyright to fasten, by notice in a book or upon one of the articles mentioned within the statute, a restriction upon the subsequent alienation of the subject matter of copyright *after the owner had parted with the title* to one who had acquired full dominion over it and had given a satisfactory price for it? It is not denied that one who has sold a copyright article, without restriction, has parted with all right to control the sale of it. The purchaser of a book, once sold by authority of the owner of the copyright, may sell it again, although he could not publish a new edition of it." (Italics ours.)

In the case at bar United did not sell a copyrighted article. It retained title to the article at all times.

Paraphrasing the preceding language of the Supreme Court, the exhibitor, licensing the right to exhibit, could only publicly perform on the days specified. He could not make a sale of the article, as he never had title to the article. He could not assign the exhibition license because it was non-assignable. He could not print or publish a new edition of the copyrighted article because he had no right to do so.

The Court then goes on at page 350:

"In this case the stipulated facts show that the books sold by the appellant were sold at wholesale, and purchased by those who made no agreement as to the control of future sales of the book, and took upon themselves no obligation to enforce the notice printed in the book, undertaking to restrict retail sales to a price of $1 per copy. The precise question, therefore, in this case is, Does the sole right to vend (named in § 4952) secure to the owner of the copyright the right, after a sale of the book to the purchaser, to restrict future sales of the book at retail, to the right to sell it at a certain price per copy, because of a notice in the book that a sale at a different price will be treated as an infringement, which notice has been brought home to one undertaking to sell for less than the named sum? We do not think the statute can be given such a construction, and it is to be remembered that this is purely a question of statutory construction. There is no claim in this case *of contract limitation,* nor license agreement controlling the subsequent sales of the book.

"In our view the copyright statutes, while protecting the owner of the copyright in his right to multiply and sell his production, do not create the right to impose, *by notice,* such as is disclosed in this case, *a limitation at which the books shall be sold at retail by future purchasers, with whom there is no privity of contract.* This conclusion is reached in view of the language of the statute read in the light of its main purpose to secure the right of multiplying copies of the work,—a right which is the special creation of the statute. True, the statute also secures, to make this right of multiplication effectual, the sole right to vend copies of the book, the production of the author's thought and conception. The owner of the copyright in this case did sell copies of the book in quantities and *at a price satisfactory to it. It has exercised the right to vend. What the complainant contends for embraces not only the right to sell the copies, but to qualify the title of a future purchaser by the reservation of the right to have the remedies of the statute against an infringer because of the printed notice of its purpose*

so to do unless the purchaser sells at a price fixed in the notice. To add to the right of exclusive sale the authority to control all future retail sales, by a notice that such sales must be made at a fixed sum, would give a right not included in the terms of the statute, and, in our view, extend its operation, by construction, beyond its meaning, when interpreted with a view to ascertaining the legislative intent in its enactment." (Italics ours.)

See also:

Scribner v. *Straus*, 210 U. S., p. 352.

Government counsel below cited a number of tying-in cases involving the patent law which clearly have no application to the case at bar.

It would seem that a condition precedent to illegality, in a price-fixing situation, is that the vendor must exercise the right to vend and part with title.

In *Straus* v. *Victor Talking Machine Co.*, 243 U. S. 490, a divided Court condemned the method used by the Victor Talking Machine Co. to control resales. In referring to the deceptive notice that appeared on the talking machine the Court, at page 500, says:

"It thus becomes clear that this 'License Notice' is not intended as a security for any further payment upon the machine for *the full price called a 'royalty' was paid before the Plaintiff parted with the possession of it* * * *.

"Courts would be perversely blind if they failed to look through such an attempt as this 'License Notice' thus plainly is to sell property for a full price and yet to place restraints upon its further alienation such as have been hateful to the law from Lord Coke's day to ours, because obnoxious to the public interest."

Again in the case at bar the same prints are leased time and again. The evidence indicates that 300 prints served 12,000 customers, so at no time does any one customer pay the cost of the production of the device that is licensed—

that is, the cost of the negative from which the print is taken, plus the cost of each particular print. The customer merely pays a license fee for the right to perform, and the license fee is based upon the admission price the particular theatre charges.

Judge Chestnut in the case of *Westway Theatres* v. *20th Century Fox*, 30 Fed. Supp. 830, in effect says:

> "The legal effect of a copyright is to create in the owner an exclusive property right with the incidental power to lease or license the use thereof by others *on stipulated terms.*" (Italics ours.)

In *Interstate Circuit* v. *United States*, 306 U. S. 208, there were two opinions. There was a prevailing opinion by Justice Stone, in which four of his colleagues concurred, and a dissenting opinion by Justice Roberts, in which two of his colleagues concurred, Justice Frankfurter taking no part in the case.

We will confine our discussion to the prevailing opinion: At page 219 Justice Stone says:

> "The trial court found that the distributor appellants agreed and conspired among themselves to take uniform action upon the proposals made by Interstate, and that they agreed and conspired with each other and with Interstate to impose the demanded restrictions upon all subsequent-run exhibitors in Dallas, Fort Worth, Houston and San Antonio; that they carried out the agreement by imposing the restrictions upon their subsequent-run licensees in those cities, causing some of them to increase their admission price to 25 cents, either generally or when restricted pictures were shown, and to abandon double-billing of all such pictures, and causing the other subsequent-run exhibitors, who were either unable or unwilling to accept the restrictions, to be deprived of any opportunity to exhibit the restricted pictures, which were the best and most popular of all new feature pictures; that the effect of the restrictions upon 'low-income members of the community' patronizing the theatres of

these exhibitors was to withhold from them altogether the 'best entertainment furnished by the motion picture industry'; and that the restrictions operated to increase the income of the distributors and of Interstate and to deflect attendance from later-run exhibitors who yielded to the restrictions to the first-run theatres of Interstate.

"The court concluded as matters of law that the agreement of the distributors with each other and those with Interstate to impose the restrictions upon subsequent-run exhibitors and the carrying of the agreements into effect with the aid and participation of Hoblitzelle and O'Donnell, constituted a combination and conspiracy in restraint of interstate commerce in violation of the Sherman Act. It also concluded that each separate agreement between Interstate and a distributor, that Interstate should subject itself to the restrictions in its subsequent-run theatres and that the distributors should impose the restrictions on all subsequent-run theatres in the Texas cities as a condition of supplying them with its feature pictures, was likewise a violation of the Act."

At page 222 Justice Stone continues:

> "There was risk, too, that without agreement diversity of action would follow. Compliance with the proposals involved a radical departure from the previous business practices of the industry and a drastic increase in admission prices of most of the subsequent-run theatres. Acceptance of the proposals was discouraged by at least three of the distributors' local managers. Independent exhibitors met and organized a futile protest which they presented to the representatives of Interstate and Consolidated. *While as a result of independent negotiations either of the two restrictions without the other could have been put in effect by any one or more of the distributors and in any one or more of the Texas cities served by Interstate,* the negotiations which ensued and which in fact did result in modifications of the proposals resulted in substantially unanimous action of the distributors, both as to the terms of the restrictions and in the selection of the four cities where they were to operate." (Italics ours.)

In other words, the majority of the Court affirmatively says that one distributor, acting independently, could have placed either of the restrictions in any license agreement it made with any exhibitor.

In discussing the rights granted to a copyright owner, Justice Stone at page 228 states:

"We have no occasion now to pass upon these or related questions. *Granted that each distributor, in the protection of his own copyright monopoly, was free to impose the present restrictions upon his licensees, we are nevertheless of the opinion that they were not free to use their copyrights as implements for restraining commerce in order to protect Interstate's motion picture theatre monopoly by suppressing competition with it. The restrictions imposed upon Interstate's competitors did not have their origin in the voluntary act of the distributors or any of them. They gave effect to the will and were subject to the control of Interstate, not by virtue of any copyright of Interstate, for it had none, but through its contract with each distributor.* Interstate was able to acquire the control and impose its will by force of its monopoly of first-run theatres in the principal cities of Texas and the threat to use its monopoly position against copyright owners who did not yield to its demands. The purpose and ultimate effect of each of its contracts with the distributors was to restrain its competitors in the theatre business by forcing an increase in their admission price and compelling them through the double feature restriction to make their entertainment less attractive, and to preclude the distributors for the specified time from relaxing the pressure of the restrictions upon them.

"The case is not one of the mere restriction of competition between the first showing of a copyrighted film by Interstate and a subsequent showing of the same film by a licensee of the copyright owner. The contract, when applied to the situation existing in the four Texas cities, had a more extensive effect. Both Interstate's first-run and second-run theatres in each of the cities regularly compete with the independent second-run theatres in those cities. Since all are in practically continuous operation during the season,

competition between them extends to the exhibition of films furnished by different distributors including those of copyright owners shown by independents, which compete with those of other copyright owners shown at the same time by Interstate. Moreover, the provision in Interstate's contracts for the restriction against double billing stipulated for restraint upon competition with Interstate in the exhibition of films in the double bill in which neither Interstate nor the licensor had any interest by way of copyright or otherwise. The patent effect of the contract was to impose an undue restraint both as to admission price and the character of the exhibition upon competing theatre businesses habitually exhibiting the competitive pictures of different copyright owners. Through acceptance of the terms by the principal distributors the contract became the ready instrument by which Interstate succeeded in dominating the business of its competitors in the Texas cities. The fact that the restrictions may have been of a kind which a distributor could voluntarily have imposed, but did not, does not alter the character of the contract as a calculated restraint upon the distribution and use of copyrighted films moving in interstate commerce. Even if it be assumed that the benefit to the distributor from the restrictions is one which it might have secured through its monopoly control of the copyright alone, that would not extend the protection of the copyright to the contract with Interstate and to the resulting restraint upon the competition of its business rivals." (Italics ours.)

It will be seen therefore that the Supreme Court in the *Interstate* case did not, as the Government contends, take away the right of each distributor, acting separately, to insert a minimum admission price.

As to the forms of the contracts put in evidence in this case, Circuit Judge Hand compared them to the standard provisions of an insurance contract. As a matter of fact, there are many differences between the various forms. The essential details are written in blank spaces in the contract, i.e., the picture or pictures licensed, the license fees—

whether percentage, guarantee against percentage, guarantee against overage or flat rental. These are clearly matters of negotiation. Likewise, the specific run or runs licensed, the various clearances, if any, the minimum admission prices to be charged for the specific engagement, etc. All these are typed either in the blank spaces in the printed form or on riders attached to the form.

The printed provisions of the agreement might be described as administrative provisions or mechanical provisions. For instance, manner of delivery of the print, what happens if the print is damaged or destroyed, the return of the print, requirements as to advertising the photoplay in the manner directed by the distributor. All these provisions are administrative or mechanical and have never been condemned in any litigation tried either by the Government or by private parties.

Now, as to United Artists:

1) The Government has put in evidence two forms of exhibition license agreements used by United Artists (G. Exs. 287-288, R. 274).

2) It has put in evidence an agreement made with Publix Theatres Corporation which expired in 1933.

3) It has put in evidence several hundred contracts without any supporting evidence of any kind or character that any of these contracts affected a competitor adversely, or the public adversely, or that any of them, in any way, violates either the Sherman Act or the Clayton Act.

As pointed out in the early part of this division of the argument, the United Artists Corporation depends upon its reward from each license from each theatre, whether these licenses be measured by a percentage of the gross receipts or a flat rental,—which are the two ordinary methods of doing business. As to the first manner, to wit:

percentage, a distributor and an exhibitor sit down and negotiate as to the amount of percentage the distributor will receive and the exhibitor will pay for the license granted. The admission price to be charged is not only an important element in the negotiation but is absolutely essential in determining the percentage to be charged. For instance, if a theatre will charge 50¢ admission fee for each performance that a particular picture is to be exhibited, then 35% of the gross receipts might be the negotiated satisfactory percentage that the distributor would accept. On the contrary, if a theatre charged 10¢, 35% would be wholly inacceptable to the distributor.

The Statutory Court in its opinion, page 3533 of the record, in discussing clearance, says:

1. "The admission price, as set by the exhibitors, of the theatres involved, * * *"

The Court would have been equally accurate if it said that in determining the percentage to be charged for a percentage engagement, the admission price is the all-important factor.

Likewise, in determining flat rentals, the admission price is equally important. A salesman or a distributor when he agrees to a flat rental clearly has percentage in mind. He bases that flat rental upon the ability of that theatre to gross, and to gross at the present admission price, and he seeks to get the highest flat rental he can secure, always keeping in mind the gross of that particular theatre.

The Statutory Court has laid down many other rules for the determination of clearance, commencing on page 3533 of the record. If these rules of negotiation for clearance are sound the same rules must apply to either the percentage or the flat rental to be charged for each license.

Resuming the discussion of the Statutory Court's erroneous finding on price fixing we now cite *Bement* v. *Harrow*, 186 U. S. 70, *General Electric* v. *United States*, 272 U. S. 476, and *United States* v. *U. S. Gypsum Co.*, 67 Fed. Supp.

397. In *United States* v. *General Electric Company*, the Court held, among other things:

a. "Conveying less than title to the patent, or part of it, a patentee may grant a license to make, use, and vend articles under the specifications of the patent, for any royalty, or upon any condition, the performance of which is reasonably within the reward which the patentee by grant of the patent is entitled to secure."

b. "After a patentee sells the patented article he can exercise no further control over what the purchaser may wish to do with the article."

c. "A patentee in granting a license to another to make and sell the patented article may limit the method of sale and the price, provided the conditions of sale are normally and reasonably adapted to secure pecuniary reward for the patentee's monopoly."

This case is cited with approval in *United States* v. *United States Gypsum Co.* (supra).

These authorities are in direct line with the argument advanced that there is no sale of a tangible or intangible article. In this case, there is a mere license of a performing right and a regulation of the price to be charged the public to see the performance.

As pointed out in the argument on uniformities, the admission price inserted is the admission price generally charged by the exhibitor (f.f. 63)—3670R—and the price fixed for exhibition, whether flat rental or percentage, is based upon the admission price.

The Statutory Court in its decree in completely eliminating the right of the distributor to insert admission prices in its contracts, went much further than its opinion. In its opinion it found conspiracy from the uniformities above referred to, notwithstanding its own finding of fact that the admission prices generally were those charged by the exhibitor at the time of the making of the license. It completely legislated this right to insert admission prices from all contracts made by United Artists Corporation for

future licensing of its product, and by so doing overruled or disregarded *United States* v. *Interstate*, 306 U. S. 208, which expressly held that the owner of the copyright had this particular right in connection with the use of his copyrighted property.

B. Road shows.

During the past thirty years a limited number of motion pictures starting with the "Birth of a Nation" have been "road-showed" as the term is theatrically understood (R. 3660). This generally means that the pictures were exhibited in quite the same manner as the legitimate theatre is operated, that is, advanced admission prices ($2, for the evening performances generally), reserved seats, and generally only two or three shows in a day.

Before the Statutory Court an effort was made to exempt road shows from the provisions of the decree. The Statutory Court completely ignored this economic necessity in its decree and made no provision for road shows. This is a complete disregard of the property rights of the producer of this type of picture. These pictures are produced at terrific cost; there can be no violation of the Sherman Act or interference with interstate commerce in any way by this type of exhibition.

Irrespective of the other conclusions reached by the Statutory Court, it should have made some provision to take care of this type of exhibition.

POINT II

The Statutory Court erred in including in its decree, subdivisions 7, 8 and 9 of II, that is, in setting up a prescribed manner and method which completely regulates the licensing of motion pictures for exhibition in theatres in the United States, which system completely disregards the rights of the owner of the copyright of each motion picture involved.

A feature motion picture is a copyrighted work. In the case of the United Artists Corporation, these feature motion pictures are produced by independent producers who use their own funds to finance production, then enter into a license agreement with the United Artists Corporation, granting the United Artists Corporation a percentage of the gross receipts to distribute said motion pictures to theatres in the United States of America and elsewhere (R. 1409).

Certain restrictive provisions are contained in the agreement between the producer and United Artists Corporation. For instance, each motion picture must be licensed separately and apart from the motion pictures of other producers (R. 1411).

Secondly, the producer retains the right to appoint a representative at the home office of the United Artists Corporation in New York City, for the purpose of approving or rejecting each separate license agreement for the exhibition of said motion picture. The pertinent excerpts of these distribution license agreements were introduced in evidence before the Statutory Court and may be found in the record, Volume 3, pages 1411 to 1414 inclusive. Since the foundation of the company, for the most part, the United Artists Corporation has licensed its pictures individually on separate contracts—one picture, one theatre.

The Statutory Court, however, is not satisfied to allow the United Artists Corporation to continue doing business in this manner.

The Court says, in subdivision 7, that United Artists is enjoined and restrained from performing or entering into any license in which the right to exhibit one feature is conditioned upon the licensee taking one or more other features. There is no evidence in the record that United Artists Corporation ever committed such an act.

Let us assume for the sake of argument that it did commit such an act. Where is there any illegality? United Artists Corporation may have a half dozen feature motion pictures ready for showing in a given theatre.

It controls the selling or licensing of the public performing rights of these six attractions. The Court, by injecting this provision, says in effect that the licensee or exhibitor or theatre owner shall have the right to say to the United Artists, "You have offered me six motion pictures, I will only license one."

In other words, the Court by decree destroys the right of the United Artists to select its own customer and license or not license, as in its judgment it deems best, for the best interest of its producers, and completely turns over to the exhibitor the entire negotiating advantage.

The Court in the same paragraph grants the exhibitor the right to reject twenty percent of any features licensed which were not "trade shown" prior to the granting of the license. In other words, if United Artists Corporation sat down with an exhibitor and, separately and independently, negotiated a license agreement which included five motion pictures, the minds of both parties meeting on terms,—notwithstanding the completed agreement, the exhibitor could eliminate from such license agreement at least one of the five motion pictures and neither play the picture nor pay the license fee. It is submitted that this is judicial legislation and completely destructive of the rights of free trade and enterprise.

Paragraph 8 of subdivision 2, page 3696 of the transcript of record, is even worse. This is the so-called competitive bidding provision. Under what law has the Statutory Court any right to single out one industry, in fact one branch of an industry, to wit, distribution of motion pictures, and in effect say you may own the distribution rights of these motion pictures but we are going to tell you exactly how you are going to license them in distribution—not how you must *not* license them where a law violation has been found—but how you must license them. You may no longer select your own customers, deal or not deal as you see fit—from now on pictures will be licensed only on the auction block, and at that on a very frail and contradictory auction block.

Paragraphs a, b, c, d and e of subdivision 8 of Section 2 are mandatory in form and a "must" to be followed.

These paragraphs are full of inconsistencies. For example, consider paragraphs a and c. If United Artists Corporation should attempt to license its pictures to an exhibitor in any particular area claimed to be competitive, any other exhibitor may invoke the provisions of subdivision c which does not include simultaneous exhibitions and immediately it is impossible to go forward under subdivision a.

Under c, United Artists Corporation must establish what in its opinion are competitive areas, and if there be any clearance provisions in any license, made on the auction block under subdivision c, the distributor then must meet the tests of clearance in subdivision 4, and be prepared to sustain the burden of proof as to the legality of any clearance granted in any license agreement, even though subdivision 4 says only such clearance as the exhibitor reasonably needs shall be granted on any run.

It is respectfully submitted that subdivision 8 and its various sub-subdivisions are far more drastic examples of judicial legislation even than 7. There is nothing in the Sherman Act or the Clayton Act, or any reported decisions, that bestows on any Court of this land the power minutely

to prescribe the entire manner and method that a company, operating in so-called free trade and enterprise, shall use in order to engage in competitive business.

The distributors of motion pictures have been singled out from all industry to test the selling theories of this Statutory Court.

This Court may take judicial notice of such famous brand names as Hickey Freeman clothes for men, Johnson Murphy shoes, Chevrolet automobiles, and many others which sell through exclusive channels.

Hickey Freeman may be found generally in only one clothing store in each competitive area. Likewise Johnson Murphy shoes.

Chevrolet cars are generally handled by only one dealer in each competitive area.

Examples, ad infinitum, of exclusive handling are within the knowledge of every member of this learned Court. This is made possible because the manufacturer or distributor has the right to select his own channel of merchandising. There should be no different rule in the licensing of motion pictures. The law is well settled on this point.

The Sherman Act provides against the continuance of practices found unlawful, and does not authorize the Court to prescribe affirmative ways of doing business. This is a legislative function, not a judicial one.

Hartford Empire Co. v. U. S., 323 U. S. 386. The Court in this case was faced with the difficult problem of awarding an injunction which would insure the desired need without imposing punishment or other obligations for past misconduct. The problem was especially difficult in view of the status and relationship of the parties. Mr. Justice Roberts, who delivered the opinion of the Court, at page 409, stated:

> "The applicable principles are not doubtful. The Sherman Act provides criminal penalties for its violation, and authorizes the recovery of a penal sum in addition to damages in a civil suit by one injured by

violation. It also authorizes an injunction to prevent continuing violations by those acting contrary to its proscriptions. The present suit is in the last named category and we may not impose penalties (Standard Oil Co. v. United States, 221 U. S. 1, 77, 78, 55 L. ed. 619, 652, 653, 31 S. Ct. 502, 34 LRA (NS) 834, Ann Cas. 1912D 734) in the guise of preventing future violations. This is not to say that a decree need deal only with the exact type of acts found to have been committed (Ethyl Gasoline Corp. v. United States, 309 U. S. 436, 461, 84 L. ed. 852, 863, 60 S. Ct. 618) or that the court should not, in framing its decree, resolve all doubts in favor of the Government (Local 167, I. B. T. v. United States, 291 U. S. 293, 299, 78 L. ed. 804, 809, 54 S. Ct. 396) or may not prohibit acts which in another setting would be unobjectionable. *But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, 'in a different class than other people,'* as the Government has suggested. The decree must not be 'so vague as to put the whole conduct of the defendants' business at the peril of a summons for contempt;' enjoin 'all possible breaches of the law;' (Swift & Co. v. United States, 196 U. S. 375, 396, 49 L. ed. 518, 524, 25 S. Ct. 276; National Labor Relations Bd. v. Express Pub. Co., 312 U. S. 426, 433, 435, 436, 85 L. ed. 930, 935-937, 61 S. Ct. 693) or cause the defendants hereafter not 'to be under the protection of the law of the land.' (New York, N. H. & H. R. Co. v. Interstate Commerce Commission, 200 U. S. 361, 404, 50 L. ed. 515, 526, 26 S. Ct. 272; Standard Oil Co. v. United States, supra (221 U. S. 80), 55 L. ed. 653, 31 S. Ct. 502, 34 L. R. A. (NS) 834, Ann. Cas. 1912D 734.) * * *." (Italics ours.)

In the case of *U. S.* v. *Pullman,* 50 Fed. Supp. 123, the plaintiff suggested that in the case of a finding of violation, the question concerning relief might be referred to a Master, or one of the regulatory commissions, to hold hearings at which experts, governmental or private, could state their views regarding proper organization of the business of passenger transportation in the United States.

In respect to this suggestion, Mr. Justice Goodrich at page 136 in his opinion, stated:

> "The court is not inclined to view favorably so ambitious a program. It does not regard itself as a legislative committee nor a regulatory commission."

> "The object to be sought for the convenience of the parties as well as the court is a decree which will ~~omit~~ the necessary elements of suitable equitable relief and require a minimum of supervision by the Court."

Section 4 of the Sherman Act confers jurisdiction on District Courts "to prevent and restrain violations of this act". This jurisdiction is to be exercised according to the general principles which govern the granting of equitable relief. It confers no new or different power than those traditionally exercised by courts of equity. Section 262 of the Judicial Code has not enlarged those powers, merely granting the right to issue all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions and agreeable to the usages and principles of law.

DeBeers Consolidated Mines v. *United States*, 89 L. Ed. 1566, 325 U. S. 212.

Appalachian Coal Co. v. *United States*, 77 L. Ed. 825, 288 U. S. 344.

The function of a court of equity has traditionally been to enjoin, but has never been to prescribe methods for the conduct of business, which is solely within the province of the legislature. The court is not a legislative committee nor a regulatory commission.

U. S. v. *Pullman*, 50 Fed. Supp. 123.

An injunction against unlawful trade practices was contemplated by Congress when it passed the Sherman Act,— jurisdiction was given to the Federal Court to enjoin violations. There are liberal provisions made to enforce these

anti-monopoly statutes. "But in no instance has it indicated an intention to interfere with ordinary commercial practices". Choosing theatres and arranging a selection of their customers may be considered the most essential factor in the maintenance of the highest standards of service.

When a decree has been handed down enjoining unfair trade practices the courts will assume that the defendants will comply with the decree. When it is shown to a court that there is not compliance with the decree, then further orders may issue.

> *United States* v. *Bausch & Lomb Optical Co.*, 321 U. S. 707.
> *United States* v. *Univis Lens Co.*, 41 Fed. Supp. 258, 316 U. S. 241.

In *Federal Trade Commission* v. *Raymond Bros. Clark Co.*, 263 U. S. 565, 573, the court holds forth at length on the right of a manufacturer to deal with persons of his own choosing, backing up this statement with continuous citations. This policy is referred to with approval in later cases, such as the *Bausch & Lomb* case (supra).

It would appear that a decree framed to preclude the revival of unlawful practices had been enlarged beyond the old and fixed doctrine of the courts as expressed in the *Hartford-Empire* case (supra).

> "But, even so, the court may not create, as to the defendants, new duties, prescription of which is the function of Congress, or place the defendants, for the future, in a different class than other people as the government has suggested."

> *Hartford Empire Co.* v. *United States*, 323 U. S. 386 at 409.

In two instances decrees were noted which regulated business practices. Both these instances are easily distinguishable from the instant decree. In *U. S.* v. *Crescent*

Amusement, 323 U. S. 173, the coercion of theatre owners was enjoined and further theatre purchases forbidden unless an affirmative showing could be made that there was no restraint on competition. This is truly a preventative measure against further infringements, and not the establishment of an entirely new system of business.

In the case of *Associated Press* v. *United States*, 326 U. S. 1, after enjoining the enforcement of offending by-laws, the court pointed out that the decree should not be considered as enjoining new by-laws which did not reinstate the practices which had been forbidden.

In formulating this drastic theory of compulsory licensing, it is interesting to note there is not one word, sentence or paragraph in the Statutory Court's mandates that requires an exhibitor or licensee to license the exhibition of any picture that is offered by a distributor. The entire compulsion is on the side of the licensor or seller, with no compulsion of any kind on the licensee or exhibitor or customer. It is respectfully submitted that the provisions of 7 and 8 violate every known principle of American freedom, and have no precedent either in law or fact which even tends to justify their inclusion in the decree of the United States District Court.

Subdivison 9 is equally objectionable for all of the reasons set forth as to 7 and 8.

The decree of the Statutory Court provides that each of the defendants is enjoined "* * * 4. From granting or enforcing any clearance against theatres in substantial competition with the theatre receiving the license for exhibition in excess of what is reasonably necessary to protect the licensee in the run granted. Whenever any clearance provision is attacked as not legal under the provisions of this decree, the burden shall be upon the distributor to sustain the legality thereof."

In the first sentence of this paragraph 4, the Statutory Court enjoins United Artists (and every other distributor) from granting or enforcing any clearance in excess of what is reasonably necessary to protect the licensee in the run

granted. No provision is made to protect the licensor in the reward it expects from the license granted. Notwithstanding this failure to give the licensor what it is clearly entitled to under its copyright, the Court then shifts the burden of proof to ~~the licensor or distributor~~ to sustain the legality of any clearance it may grant to any exhibitor. This is contrary to every rule of procedure in American jurisprudence. See Richardson on Evidence, Sixth Edition, Section 171. When clearance is challenged, it should be the duty of the challenger to prove the illegality of the clearance. He who asserts a proposition should have the burden of establishing it. There are many statements of the rule. See *Reliance Life Insurance Company* v. *Burgess*, 112 F. (2d) 234; cert. denied, 311 U. S. 699, rehearing denied, 311 U. S. 730; *Cowen Co.* v. *Houck Mfg. Co.*, 249 F. 285; *Kohlsaat* v. *Parkersburg & Marietta Sand Co.*, 266 F. 283; *Lilienthal's Tobacco* v. *United States*, 97 U. S. 237; *Cochran* v. *Pittsburgh & L. E. R. Company*, 31 F. (2d) 769; *Barnett* v. *Kunkel*, 259 Fed. 394, 401.

It is clear that the Statutory Court by its decree, is attempting to upset one of the most firmly imbedded principles of procedure. The provisions in the decree shifting the burden are clearly contrary to the principles of law as enumerated by the authorities.

POINT III

The Statutory Court erred

(a) In holding franchises illegal per se (R. 3696; subd. 5 of II of Decree);

(b) In directing United Artists to disregard the rights of its old customers (R. 3697), as well as the right to select its own customers;

(c) In enjoining clearance which was reasonably calculated to protect United Artists' revenue;

(d) In finding that United Artists acted in concert with distributor defendants in the formation of a uniform system of clearances;

(e) In finding that United Artists Corporation in any manner violated any of the provisions of the Sherman or Clayton Acts.

(a) At the time of the trial, United Artists Corporation had no franchises. (Government counsel intimated that United Artists had a franchise with Paramount which had expired in 1933, and did in fact offer it as an exhibit.) Notwithstanding the fact that it has no franchises, United Artists will not subscribe to the proposition that a franchise is illegal per se. Changing times and changing conditions might require United Artists Corporation to change its entire method of doing business and it may desire, separately and independently, to enter into franchise agreements with theatres.

What is a franchise? It is a contract with an exhibitor that extends over a period of more than one year, generally either two years or three years. Mr. Scully, testifying for Universal, in effect showed that his company made franchises for the most part with independent exhibitors—"727 with independent exhibitors as against 43 with affiliated exhibitors" (R. 1455-1484, Ex. U-2).

In all the patent cases, the exclusive right to use a patent has never been held invalid where the patent license did not exceed the life of the patent. On the contrary, the right to make exclusive grants for periods of years has been recognized in all licenses as a matter of law. Why is it illegal for a distributor, which controls less than five per-cent of the feature pictures made, to make a contract for two years rather than for one year?

In the cases involving the licensing of the right to vend and dispense Coca-Cola and other soft drinks, franchises for long periods of years have been held legal and enforceable. Even in instances where the franchise was indefinite as to period, it was held as non-cancellable by the licensor.

Coca-Cola Bottling v. *Coca Cola*, 269 Fed. 796.

No evidence was produced by the Government to show that any franchise put in evidence in any way tended to create a monopoly in any exhibitor licensee. The only inference that may be drawn from Scully's testimony is that franchises tended to stimulate and create competition. It insured independent exhibitors product for their theatres and provided the non-theatre owning distributor with assured outlets for its product. The finding of the Statutory Court was a gratuitous finding, wholly unsupported by the evidence; and contrary to all existing law, and an absolute restriction of free American trade and enterprise.

(b) United Artists has been deprived in this decree of the right to select its own customers, and must completely disregard the rights of its old customers.

A distributor of motion pictures may select the customer with whom it wishes to deal for any reason or no reason. The customer likewise has the concomitant and correlative right and may exercise its full economic power in connection with such choice.

Greater N. Y. Film Rental v. *Biograph*, 203 Fed. 39.
Federal Trade Commission v. *Paramount*, 57 F. (2d) 152, 156.
Rembush v. *M. P. P. D. A.*, unreported, S. D. N. Y., 1934.
Federal Trade Commission v. *Curtis*, 260 U. S. 568.
Federal Trade Commission v. *Raymond*, 263 U. S. 565.
Grenada Lumber Co. v. *Miss.*, 217 U. S. 433.
Locker v. *American Tobacco*, 218 Fed. 447.
United States v. *Colgate*, 250 U. S. 300.
Great A. & P. Tea Co. v. *Cream of Wheat*, 227 Fed. 46.
Rolsky v. *Fox Midwest, etc.*, unreported, C. C. H. Fed. Trade Reg. Serv. p. 6442 (1936), 93 F. (2d) 1014 (memo.).
Westway v. *20th Century Fox*, 30 F. Supp. 830, aff'd 113 F. (2d) 932.
Gary Theatre Co. v. *Columbia Pictures Corp.* (C. C. A. 7th, 1941), 120 F. (2d) 891.
Hood Rubber v. *U. S. Rubber*, 229 Fed. 583.
Green v. *Victor*, 24 F. (2d) 378.
Virtue v. *Creamery*, 227 U. S. 8.
Federal Trade Commission v. *Gratz*, 253 U. S. 421.
Johnson v. *J. H. Yost Lumber Co.*, 117 F. (2d) 53.
Midwest Theatres Co. v. *Co-operative Theatres of Michigan, Inc.*, 43 Fed. Supp. 216.

This Court has explicitly and expressly recognized the right of a seller "to select his own customer" which the plaintiff now asks this Court to declare illegal. It has in so many words recognized the right of a buyer, in effect, to say to the seller "Either you sell to my competitor or you sell to me, but not both."

"He may lawfully make a fixed rule of conduct not to buy from a producer or manufacturer who sells to consumers in competition with himself. *Grenada Lumber Co.* v. *Miss.*, 217 U. S. 433, 440 * * *. Or he may stop dealing with a wholesaler who he thinks is acting

unfairly in trying to undermine his trade. *Eastern States Retail Lumber Dealers' Asso.* v. *United States*, supra, p. 614; *United States* v. *Colgate & Co.*, supra, p. 307. Likewise a wholesale dealer has the right to stop dealing with a manufacturer 'for reasons sufficient to himself.' And he may do so because he thinks such manufacturer is undermining his trade by selling either to a competing wholesaler or to a retailer competing with his own customers. Such other wholesaler or retailer has the reciprocal right to stop dealing with the manufacturer. This each may do, in the exercise of free competition, leaving it to the manufacturer to determine which customer, in the exercise of his own judgment, he desires to retain."

Federal Trade Commission v. *Raymond Co.*, 263 U. S., p. 573.

See also:

U. S. v. *Colgate*, 250 U. S. 300.
Moore v. *N. Y. Cotton Exchange*, 270 U. S. 593, 605.

This is merely the identical principle applied to the converse state of facts in *Federal Trade Commission* v. *Paramount*, 57 F. (2d) 152, in which the Circuit Court of Appeals, Second Circuit, held that the presentation of the alternative of "all or nothing" imposed no restraint upon the freedom of choice.

"A distributor of films * * * has the right to select his own customers and to sell * * * or to refuse to sell at all to any particular person for reasons of his own." (Citing cases at p. 156.)

In *Midwest Theatres Co.* v. *Co-operative Theatres of Michigan, Inc.*, Judge Picard said at page 221:

"On the contrary, our courts have held many times that the distributor may sell to whom he desires and that he may provide for clearance or even not to sell to any other competing exhibitor at all until after the clearance period."

Westway Theatre, Inc. v. *Twentieth Century Fox Film Corporation*, 30 Fed. Supp. 830.

Arthur v. *Kraft-Phenix Cheese Corporation*, 26 Fed. Supp. 824.

Gary Theatre Company v. *Columbia Pictures Corporation et al.*, 120 F. 2d 891.

~~*United States* v. *Colgate & Co.*, 250 U. S. 300, 307.~~

Federal Trade Commission v. *Beechnut Packing Co.*, 257 U. S. 441.

Great Atlantic and Pacific Tea Co. v. *Cream of Wheat Co.*, 227 Fed. 46, 250 U. S. 300, 224 Fed. 566.

See also:

Baran v. *Goodyear, etc.*, 256 Fed. 571.

Becton, Dickinson, etc. v. *Eisele & Co.*, 86 F. (2d) 267.

Bement v. *National Harrow Co.*, 186 U. S. 70.

Ethyl Gasoline Corp. v. *United States*, 309 U. S. 436.

The Sherman Act was not designed to reduce every competitor to equality. The purpose of the Sherman Act is simply to eliminate interstate *"restraints of trade"* and nothing more.

> "The mere fact that a given method of competition makes it difficult for competitors to do business successfully is not of itself sufficient to brand the method of competition as unlawful and unfair. Fed. Trade Comm. v. Curtis Pub. Co., 260 U. S. 568, 43 S. Ct. 210, 213, 67 L. Ed. 408; Fed. Trade Comm. v. Sinclair Refining Co., 261 U. S. 463, 43 S. Ct. 450, 67 L. Ed. 746. From the tables referred to above, it is apparent that the respondent did not have a monopoly in the film industry" (*Fed. Trade Comm.* v. *Paramount*, supra, at p. 157).

* * * * * * *

> "The national will has not declared against elimination of competitors when they fail from their inherent industrial weakness" (*U. S.* v. *Corn Products, etc.*, 234 Fed. at 1015).

In *Great Atlantic & Pacific Tea Co.* v. *Cream of Wheat*, 227 Fed. 46 (C. C. A. 2nd, 1913), the Circuit Court of Appeals for the Second Circuit said at page 49:

> "Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. *We have not yet reached the stage where the selection of a trader's customers is made for him by the government.*" (Italics ours.)

And that same court in *Green* v. *Victor Talking Machine Co.*, 24 F. (2d) 378 (C. C. A. 2nd, 1928), reaffirmed this doctrine in the following language at page 382:

> "But no case has decided, so far as we are aware, that the refusal of one individual to deal with another requires justification. A private trader is privileged to exercise his own pleasure as to parties with whom he will deal. *Fed. Trade Comm.* v. *Raymond Co.*, 263 U. S. 565, 573. * * * *Great Atlantic & Pac. Tea Co.* v. *Cream of Wheat Co.* (D. C.), 224 F. 566, 574, aff'd 227 F. 46, 48 (C. C. A. 2). To make his motive in exercising this privilege the subject of judicial inquiry would be a step beyond what the courts have yet done, or what we think they can wisely do in the present stage of our economic order."

In *Rolsky* v. *Fox Widwest Theatres, Inc.* (W. D. Mo., 1936), C. C. H. Fed. Trade Reg. Serv., p. 6442 (1936), the Court said:

> "Now, if we have, for example, three distributors, 'A', 'B' and 'C', and two exhibitors, 'X' and 'Y', and the business of 'X' is ten times as valuable to the distributors, 'A', 'B' and 'C', as the business of 'Y', and if 'X' demands of 'A', 'B' and 'C' a certain type of contract different from that which 'Y' demands, and if

the type of contract which 'X' demands is the type which generally is used, and which generally is looked upon by distributors as more advantageous than the type that 'Y' demands, if, with all of those facts and circumstances, 'A', 'B' and 'C' do enter into contracts with exhibitors 'X' and 'Y' of the type which 'X' demands, rather than of the type which 'Y' demands, the explanation of that fact, the sensible explanation of it, the reasonable explanation, *the plausible explanation of it that they have done so because the more important customer has demanded it of each of them, because it is more advantageous to them, from a pecuniary standpoint,* rather than that they have entered into an agreement with each other that they will enter into that type of contract with exhibitor customers. The explanation which is consistent with innocence and with that which is lawful is so much more reasonable than the explanation which imputes illegality to the producers, that apart from any presumption in favor of lawful conduct, the first explanation should be accepted. * * *"

"3. During the argument of the case, what I think was a new theory was advanced by learned counsel for the plaintiffs. I do not know that it was a theory that was new in his mind just at the time it was advanced by him. I do not think it was present in his mind when the bill was drawn. Certainly it is not clearly presented by the allegations contained in the bill, although they may be sufficient to embrace it. That new theory is this: Even if no concert of action has been proved against the distributor defendants, no conspiracy, nevertheless, it has been proved that each of the distributor defendants entered into a contract with the defendant, Fox Midwest Theatres, Inc., by which that defendant was given a priority of run as to pictures sold it over some, at least, of the plaintiff exhibitors. The theory is that a contract of that character violates the Sherman Anti-Trust Statute, provided it has the effect of restraining interstate commerce. I do not think the theory is sound.

"The evidence in the case is that moving picture films are copyrighted. When a given distributor sells or licenses a given picture to a given exhibitor it does that by virtue of the ownership of the copyright and

of the rights conferred by law on him who owns a copyright. I think there cannot be any doubt whatever but that a distributor of motion pictures, owning a copyright upon a given picture may sell to an exhibitor in a given area the exclusive right to exhibit that picture, either for a short period or for a long period, provided it is not longer than the life of the copyright, without regard to whether that exhibitor is one who charges the same or a different admission price from that which is charged by another exhibitor or other exhibitors in the same area."

The selection of one buyer and the exclusion of another, even though it severely handicaps the excluded buyer in his competitive position, does not make such selection a violation of the Sherman Act.

In *Arthur* v. *Kraft-Phenix, etc.* (supra) plaintiff alleged that defendant terminated its position as distributor of Kraft-Phenix products, because it refused to obey the dictates of the defendant and buy out a competitor distributor. But this did not save the complaint from dismissal.

In *Green* v. *Victor, etc.* (supra) plaintiff alleged that the defendant ceased to do business with her corporation in order to coerce her into selling out her stock.

In the *Raymond* case (supra) the defendant was alleged to have committed acts and practices, the purpose and effect of which was to cut off the supplies purchased by a competitor from the T. A. Snider Preserve Company and thereby stifle and prevent competition of such competitor and to interfere with the right of the competitor to deal freely with the Snider Company. The Raymond Company used its buying power by threatening to withdraw its trade from the Snider Company in order to coerce the Snider Company into refraining from selling Snider Company products to a competitor. "In threatening to withdraw its trade from the Snider Company" the Raymond Company "exercised its lawful right" (p. 574). We assume that the Snider Company in succumbing or submitting to the "buying power" of the Raymond Company did not violate the Sherman Act.

In *Locker* v. *American Tobacco Co.* (supra) the complainant complained because the defendant tobacco companies had placed all their jobbing business for New York City with one jobber, thereby excluding plaintiff from his former market and working apparently irreparable harm to him. The Circuit Court of Appeals (2nd Cir.) found nothing illegal about this, declaring at page 450:

> "The laws of trade are not wholly altruistic, they may often be hard and selfish, but it is no part of the duty of courts to attempt to enforce the precepts of the decalogue. In the struggles engendered by fierce competition, losses must occur and injustice may be done, but this is frequently inevitable and cannot be prevented so long as the parties keep within the law."

Examples from the above cited cases could be multplied to demonstrate that the right to exclude is not diminished because the excluded party is thereby injured. This may be a consequence of the legal use of a legal right.

So long as we still have private property, and so long as the motion picture industry is not a public utility required by law to sell to everyone through a Public Service Commission which will grade pictures and fix prices, select dates, allocate preferred playing time, establish clearances, etc., etc., etc., it is the right of United Artists, acting separately and independently, to sell its pictures to the customer it considers will return to it the largest revenue.

(c) The right of United Artists Corporation to grant clearance in an exhibition agreement is legal.

- *Westway Theatres, Inc.* v. *20th Century Fox,* 30 Fed. Supp. 830, aff'd 113 Fed. (2d) 932.
- *Gary Theatres Co.* v. *Columbia,* 120 Fed. (2d) 891.
- *Peoples' Theatre Co.* v. *Minneapolis Film Board of Trade,* U. S. District Court, Minnesota, not officially reported.
- *Shubert* v. *Metro,* U. S. District Court, Minnesota, not officially reported.

The statutory court in particular recognized this principle, but in Section 4 of II of the decree it whittled this right to such a degree that the distributor cannot grant such clearance as the distributor needed for the protection of the distributor's revenue, but limits the grant to such as will reasonably protect the exhibitor. This is expressly contrary to the finding of this Court in *Interstate v. United States* (supra). The copyright owner, producer or distributor is entitled to place the necessary restrictions to protect its reward under the *Interstate* case, and not limited to what the exhibitor needs for its reward. This argument has been fully developed heretofore in the brief in discussing the other assignments of error.

POINT IV

The decree of the Statutory Court instead of correcting alleged wrongs will ultimately destroy this industry.

The Statutory Court refused the Government's prayer that the major defendants be required to divest themselves of their theatres which, as heretofore pointed out, was the principal demand of the Government in its Bill of Complaint and on the trial.

Since this decree was entered, the eight distributing defendants have been deluged with a flood of litigation by exhibitors claiming to have been aggrieved because (a) the distributors had previously inserted minimum admission prices in their license contracts, or (b) had licensed exhibition rights on specific runs or availabilities, or (c) had granted clearances between runs, or (d) had made franchise agreements, or (e) had made formula deals, or (f) had recognized the rights of old customers, or (g) had failed to recognize the rights of old customers.

A series of lawsuits by theatre operators has been started based entirely on these alleged violations of law.

In those lawsuits, through depositions, the plaintiffs are endeavoring to establish the above practices with the hope that upon trial they may establish a prima facie case for treble damages by showing the decree of the Statutory Court as per the provisions of Section 16 of the Clayton Act, plus some evidence of the local situations.

The flood gates are open. Under this decree the entire production and distribution side of the motion picture industry is doomed to destruction, as no industry can survive the flood of damage suits that theatre operators have begun and are bound to institute.

This decree to the Government's contention, instead of solving the problems of the industry, may well be the instrument to destroy the entire economic structure of the industry, an industry, which the record shows, has been built from the cheap nickelodeon to a magnificent achievement, where every city and town has its own Radio City Music Hall, or its small edition thereof, offering worthwhile entertainment weekly to over eighty million theatregoers in the United States alone.

The Statutory Court and these litigating exhibitors overlook the fact that no theatre can survive unless it has motion pictures to exhibit. If this decree remains nothing can save the distribution business.

The Government did not call a single witness to establish that any theatre owner suffered in any degree as a result of either block selling, runs, availabilities, clearances, minimum admission prices, franchises, formula deals, or any of the distribution trade practices condemned by the Statutory Court in Section II of the decree.

The Government produced charts, records, and the accountants who prepared the charts, as a substitute for exhibitors because exhibitors would substantiate the testimony of the distributors that these uniformities and these trade practices grew out of many years of competition rather than out of combination or conspiracy.

The Government substituted inferences placed upon inferences instead of factual testimony.

The Government sought to confuse the Statutory Court, and did actually succeed in confusing the Court, that great privileges and priorities were given to so-called affiliated exhibitors while different treatment was afforded the so-called independent exhibitors.

The undisputed evidence shows that United Artists dealt with the independents in the same manner in which it dealt with affiliates. The same form of contract was generally used. The same rights were granted, both affiliate and independent alike, as to run, clearances, availability, admission prices and otherwise.

Nothing was shown that required the Statutory Court to strike down the manner and method of doing business and to substitute its own formula.

The evidence disclosed that during the period of the suit all theatres enjoyed the greatest prosperity known to the amusement business (see p. 1180, R.).

The evidence showed that every branch of the public had an opportunity to see pictures, and the best pictures, at an admission price suitable to every pocketbook.

Pictures under the run, clearance and availability system, are shown at the higher admission prices in the Radio City Music Hall and then, in exactly the same manner, all the way down to the last run theatre in the City of New York,—and in like manner in every other city,—with admission prices growing progressively lower as the picture travelled from theatre to theatre, so that the individual with the smallest pocketbook may see the same picture in the same manner as when it was first exhibited at the high admission prices in the Radio City Music Hall.

In like manner, as the runs progress the license fees to the distributor progressively decrease.

The Government introduced contracts that showed a theatre paying as low as $10 for the right to exhibit a particular picture, while a theatre in the same community, for the first run, paid thousands of dollars.

Runs, clearances and availability are not new, novel or original in the motion picture business. They are a fundamental part of all show business.

In the legitimate theatre, Ziegfeld Follies would play in the New Amsterdam Theatre in New York City and in no other theatre in that city. Because of the tremendous cost of movement, it might later play Boston, Philadelphia, Chicago, Detroit, Cleveland and a few other large cities. The public, if it wished to see Mr. Ziegfeld's show, would have to journey to these particular cities.

A legitimate play of a dramatic nature, such as "Turn To The Right" or "Lightnin' ", would play in one theatre in New York City. Because of the small size of the dramatic offering, touring companies might be organized and four or five companies of "Turn To The Right" or "Lightnin' " might tour the whole United States, but would play in only one theatre in each city.

These tours might last two or three years; then the play would become available for stock and stock companies could rent the plays on a royalty basis. But even then these stock companies only operated in a limited number of towns and cities and generally for a short season.

Vaudeville of yesterday and burlesque of yesterday used the run and clearance system with the same exclusivity as the legitimate theatre.

The name of B. F. Keith was a household word in the eastern half of the United States in the days of "big time" vaudeville. Outside of New York City there was only one "big time" B. F. Keith vaudeville theatre in a city, and then only in the larger and more important cities. This show house would feature an orchestra, nine or ten acts of big time vaudeville and a newsreel. Acts played in this type of theatre would not be booked elsewhere in that city or community during that particular season. There were so-called vaudeville houses of lesser importance in each of the cities and these theatres featured acts which did not headline on the "big time".

In burlesque we had the Columbia Wheel. One theatre in each city played each of these shows one week during their forty-week season.

The motion picture distributors, following the pattern of show business and enlarging upon it, have made it possible for every branch of the public in every city boasting more than one theatre, by a system of multiple runs to see every picture produced and released for exhibition in the United States.

Every small town or hamlet that has any kind of a motion picture theatre or school or hall equipped to show motion pictures, has the opportunity to see "Gone With The Wind", "Henry The Fifth", "Abbott & Costello", or any other form of motion picture entertainment.

There is no need to journey to Buffalo or Cleveland to see "Ziegfeld Follies" in motion pictures, as it may be seen in Cambridge, Ohio, or Attica, New York, in exactly the same technicolor as when it was exhibited in the largest and best theatre in those towns.

In the present case the Court arrived at its conclusion of conspiracy and that the trade practices which it condemned were unlawful on examination only of the practices themselves, holding them illegal on their face in disregard of testimony as to their actual purpose and with no proof of their effect. The result is that certain practices have been held *per se* unlawful, and from the mere similarity of contractual provisions, caused, as the uncontradicted testimony of those who made the contract showed, by the inevitable forces of competition which compels similarity, the Court below has inferred that the defendants have combined and conspired in violation of the Sherman Act. The serious consequences to the defendants, to the industry and the public of such a judgment is apparent.

These countless treble damage suits have been instituted by exhibitors who now feel that the decree gives them opportunity for a windfall. The amounts demanded in these suits already instituted aggregate many millions of dollars damage, a staggering amount for eight members of an industry (and especially United Artists), already hard pressed because of increasing trade barriers and confiscatory taxation threatening to bar their products from

the markets of the world. Thus it is the duty of this Court to hold on this record that no illegality of the trade practices and unlawful conspiracy have been established.

The foregoing is not intended as a plea to permit any defendant to escape the penalty prescribed by Congress for unlawful conduct, but rather to point out that when the consequences of a holding of conspiracy and that a practice or contract is unlawful are so serious and far reaching, the Courts should be particularly zealous to discover the actual facts before passing judgment and doubly reluctant to declare them unlawful without proof as to their real purpose and effect, and that where the lower Court has made such decree without such an inquiry, this Court should not permit it to stand as *prima facie* evidence of illegality.

CONCLUSION

It is respectfully submitted that the decree of the Statutory Court as to the United Artists Corporation should be reversed and that a decree of dismissal should be entered as to the appellant United Artists Corporation.

Respectfully submitted,

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